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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re Ivory Trading Company, Inc., dba Ivory Headwear Co., Debtor.	Case No. 15-32026-pcm11 **BANK OF THE WEST'S OBJECTIONS TO CONFIRMATION OF CHAPTER 11 FIRST AMENDED PLAN OF REORGANIZATION**

Bank of the West ("BofW") hereby objects to the June 16, 2015 Chapter 11 first Amended Plan of Reorganization (the "Plan") filed by the debtor.

INTRODUCTION

Over ten years ago, on September 13, 2004, Ivory Trading Company, Inc., dba Ivory Headwear Co. ("Ivory") executed a promissory note in the original principal amount of $2,000,000 (along with the personal guarantee of the principal Michael Ivory). The first maturity was set to occur approximately one year later on August 31, 2005. BofW has cooperated beyond the normal course of dealing by creditors and has granted numerous extensions and renewals that have largely been on an annual basis. In early 2014, BofW agreed one last time to modify the loan with a maturity at payoff of December 31, 2014, coupled with a confession of judgment and forbearance agreement. Ivory guaranteed the debt and also confessed judgment.

When the obligation became due at the end of 2014, BofW essentially granted debtor several additional months in order to arrange for alternative financing or an infusion of cash or investment from third-party sources as promoted by Ivory. However, new investors did not materialize, and the debtor instead filed this Chapter 11 proceeding on April 27, 2015.

The debtor has now proposed a plan that will operate as unfair treatment to BofW. The Plan proposes three (3) impaired classes, including BofW:

Class 1 is the Bank of the West Claim payable within 60-months, including final balloon payment of $180,000;

Class 2 is the allowed unsecured claims in amounts in excess of $13,000 payable within 60-months of the effective date of the Plan; and

Class 3 is the allowed unsecured claims in an amount less than $13,000 payable within 60-days of the effective date of the Plan.

The terms of the Plan applicable to the BofW Class are not fair, equitable, or feasible.

ARGUMENT

A. Debtor's Plan Is Not Fair and Equitable and Unfairly Discriminates.

Pursuant to the Bankruptcy Code, the Plan must not unfairly discriminate and it must be fair and equitable. A Plan unfairly discriminates against a class if another class of equal rank in priority will receive greater value under the Plan than the non-accepting class without reasonable justification. 11 U.S.C. § 1129(b)(2)(A). A plan may provide for different treatment for classes of equal rank and priority as long as such treatment does not rise to the level of unfair discrimination.

Under Section 1129(b)(2)(A)(i) of the Code, a Plan is fair and equitable if the Plan provides that the class will: retain its security interest to the extent of the allowed amount of its claim, and receive deferred cash payments with a present value of at least the value of its

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interest in the collateral securing its claim. Plans calling for "balloon" payments are regularly found not to be feasible. *See, e.g., In re M & S Assocs., Ltd.*, 138 B.R. 845, 851 (1992); In re Guilford Telecasters, Inc., 128 B.R. 622, 627-28 (1991); In re Sovereign Oil Co., 128 B.R. 585, 586-87 (1991).

Here, the Plan does not include complete payment of the debt owed to BofW. The five-year reorganization will result in a large balloon payment owing at the end of the term. It is not fair or equitable to subject BofW to a reorganization plan that will satisfy the debts of the other creditors, while providing no real explanation as to how the balance of $180,000, owing at the end of the five years, will be paid.

In addition to the above consideration, the proposed projections include elaborate and unnecessary expenses, where funds could otherwise be applied to the debt owed to BofW. For example, the projections provide for weekly entertainment expenses exceeding $900, which has increased several thousands of dollars from the 2014 expenses. In addition, debtor's projections appear to include an unnecessary golf club family membership and a cash reserve fund. To provide for these expenses while proposing a plan that leaves almost a third of the debt owed to BofW to be paid in a balloon payment at the end of the Plan's term is not fair or equitable to BofW.

B. The Plan is not feasible.

Pursuant to 11 U.S.C. § 1129(a)(11), the Court may confirm a plan only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." This test "requires a determination regarding [the] feasibility of the plan." S. Rep. No. 95-989, at 128 (1978). The purpose of the feasibility requirement "is to prevent the confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *In re Pizza of Haw., Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985) (internal quotation marks and citation omitted).

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The proponent of a plan has the burden to demonstrate that the plan is feasible. *See In re Acequia, Inc.*, 787 F.2d 1352, 1358 (9th Cir. 1986). "Feasibility determinations must be 'firmly rooted in predictions based on objective fact.'" *In re Danny Thomas Props. II Ltd. P'ship*, 241 F.3d 959, 964 (8th Cir. 2001) (*quoting In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985)).

Here, the debtor has not met, and cannot meet, its burden of proving feasibility under § 1129(a)(11).The Plan does not contemplate how the debtor will satisfy the balance of $180,000 owed to BofW at the conclusion of the 5 year term of the Plan. The debt with BofW is amortized over seven years, however, the Plan calls for a five year payout. Based on the terms of the plan, it is simply not feasible to satisfy the debt owed to BofW. While the debtor may hope or believe, that it can execute the Plan, the Bankruptcy Code requires more than that before binding a creditor to a five-year repayment scheme, with a final substantial balloon payment. It requires predictions grounded in objective fact and evidence of financial progress, rather than speculation and conjecture, to show that a debtor will succeed where it has failed repeatedly before. Debtor has been unable or unwilling to provide this objective evidence, presumably because the objective evidence would show that the Plan is not feasible.

Courts have found that similar plans of reorganization, depending on mere speculation to support balloon payments, do not meet the criteria of "feasible." *See In re Edgewater Motel, Inc.*, 85 B.R. 989 (Bankr. E.D. Tenn. 1988) (rejecting as unfeasible plan to repay construction lender based on 25-year amortization schedule with 9% interest per annum and 10-year balloon payment because court was not satisfied with debtor's ability to meet its projections and considered ability of debtor to make balloon payment in year 10 to be speculative); *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 508-10 (Bankr. S.D. Tex. 1989) (finding proposed balloon payment unfeasibly speculative because income from debtor's real estate was questionable and ability to fund balloon payment was based on market improvement).

The debtor's ability to make the payments contemplated under the plan, including the balloon payment, is not grounded in objective fact.

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RESERVATION

BofW reserves its right to raise further objections as additional information becomes available.

CONCLUSION

Based on the foregoing, BofW respectfully requests that the Court reject the Plan as it is not feasible and is inequitable.

DATED: August 21, 2015.

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Of Attorneys for Creditor Bank of the West

CERTIFICATE OF SERVICE

I certify that on this 21st day of August, 2015, the foregoing **BANK OF THE WEST'S OBJECTIONS TO CONFIRMATION OF CHAPTER 11 FIRST AMENDED PLAN OF REORGANIZATION** will be served in accordance with the Court's CM/ECF system which will send notification of such filing by notice via email to the ECF participants of record a true copy of the foregoing document.

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